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**1994 Wis Eth Bd 7**  
LOCAL CODE; DISQUALIFICATION; EMPLOYMENT CONFLICTING  
WITH OFFICIAL DUTIES; IMPROPER USE OF OFFICE

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A town board member should not as a matter of policy, participate in the town's consideration of a landfill expansion as long as the member derives financial benefit from his or her spouse's employment by a company owned by the individual owning the controlling interest in the landfill operator. A town board member may participate in such a decision without restriction from laws administered by the Ethics Board where the town board member's child is so employed and the member's child neither supports nor derives support from the town board member. (OEB94-7) October 20, 1994

Facts

[1] This opinion is based upon these understandings:

- a. You are a Town Attorney.
- b. The Town has appointed members to serve on a local landfill negotiating committee pursuant to §144.445, *Wisconsin Statutes*, in connection with a proposed landfill expansion in the Township.
- c. The local committee will negotiate the terms of any landfill expansion and the Town Board ultimately will decide whether or not to expand the landfill.
- d. The Town Chair's spouse is employed as office manager by a company that is a wholly owned subsidiary of a company owned by an individual.
- e. The individual's company also wholly owns another company which operates the landfill.
- f. A second member of the Town Board has been appointed to serve on the local negotiating committee.
- g. The child of the second Board member also is an employee of the corporation that employs the Town Chair's spouse. The child neither supports nor derives support from the Board member.

Questions

[2] The Ethics Board understands your questions to be:

1. May a member of a town board, in his or her official capacity, participate in the town's decision to expand a landfill if the employer of the member's spouse has a substantial pecuniary interest in the matter?
2. May a member of a town board, in his or her official capacity as a town board member or as a member of a local landfill negotiating committee, participate in the town's decision to expand a landfill if the employer of the member's child has a substantial pecuniary interest in the matter?

### Discussion

[3] Both individuals about whom you have asked are "local public officials" subject to the Code of Ethics for Local Public Officials, Employees and Candidates, §19.59, *Wisconsin Statutes*.<sup>1</sup>

### *Town Board Chair*

[4] Section 19.59, *Wisconsin Statutes*, generally prohibits a local public official (1) from using his or her office to obtain anything of substantial value or a substantial benefit for himself or herself or for an organization with which the official is associated or (2) from taking any official action substantially affecting a matter in which the official or an organization with which the official is associated has a substantial financial interest.<sup>2</sup> In addition, the statute prohibits a local public official from accepting anything of value "if it could reasonably be expected to influence the local public official's vote, official actions or judgment."<sup>3</sup>

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<sup>1</sup> Individuals holding the elective office of town board member as well as individuals who are appointed members of landfill negotiating committees are local public officials. §19.42(7u), (7w), (7x); 1992 Wis Eth Bd 12.

<sup>2</sup> Section 19.59(1)(a) and (c), *Wisconsin Statutes*, provides:

**19.59 Codes of ethics for local government officials, employees and candidates.** (1)(a) No local public official may use his or her public position or office to obtain financial gain or anything of substantial value for the private benefit of himself or herself or his or her immediate family, or for an organization with which he or she is associated. This paragraph does not prohibit a local public official from using the title or prestige of his or her office to obtain campaign contributions that are permitted and reported as required by ch. 11.

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(c) Except as otherwise provided in par. (d), no local public official may:

1. Take any official action substantially affecting a matter in which the official, a member of his or her immediate family, or an organization with which the official is associated has a substantial financial interest.
2. Use his or her office or position in a way that produces or assists in the production of a substantial benefit, direct or indirect, for the official, one or more members of the official's immediate family either separately or together, or an organization with which the official is associated.

<sup>3</sup> Section 19.59(1)(b), *Wisconsin Statutes*.

### Use of Office

[5] Under the terms of the statute, an official is deemed associated with an organization if the official or a member of the official's immediate family

“is a director, officer or trustee, or owns or controls, directly or indirectly, and severally or in the aggregate, at least 10% of the outstanding equity or of which an individual or a member of his or her immediate family is an authorized representative or agent.”

§19.42(2), *Wisconsin Statutes*. A member of an official's immediate family includes a spouse. §19.42((7), *Wisconsin Statutes*.

[6] In the present case, the Town Board Chair is not associated, within the meaning of the statute, with the corporation that operates the landfill. Thus, unless the employment or compensation of the Chair's spouse would be affected by the decision to expand the landfill, §19.59(1)(a) and (c) are unlikely to serve as a bar to the Chair's participation in the city's decision with respect to the building.

### Influencing Judgment

[7] Section 19.59(1)(b) provides that an official may not accept anything of value if it could reasonably be expected to influence the official's vote, actions or judgment.<sup>4</sup> In addition, a public officer owes an undivided duty of loyalty to the public whom he or she serves.<sup>5</sup> The question under the statute is whether the continued employment of the Town Chair's spouse by a company owned by the owner of the controlling interest in the landfill operator could reasonably be expected to influence the Chair's judgment with respect to the town's decision whether to expand the landfill. This is an objective test; the answer is what a reasonable person could expect under the circumstances.

[8] In our view, the continued employment of the Town Chair's spouse by a company owned by an individual having a demonstrated interest in the town's decision on the landfill expansion could reasonably be expected to influence the Chair's judgment in that decision. This comports with common sense and with the view of the courts.<sup>6</sup> Thus, unless there are other factors of

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<sup>4</sup> Section 19.42(1), *Wisconsin Statutes*, defines “anything of value,” in relevant part, as

[A]ny money or property, favor, service, payment, advance, forbearance, loan, or promise of future employment . . . .

<sup>5</sup> 1993 Wis Eth Bd 04; 1992 Wis Eth Bd 33; 1992 Wis Eth Bd 32; 8 Op. Eth. Bd. 33 (1985); 63A Am. Jur. 2d, Public Officials and Employees §§321, 322.

<sup>6</sup> Our advise is consistent with the views expressed by courts both in Wisconsin and elsewhere. See, e.g., *Zagoreos v. Conklin*, 491 N.Y.S.2d (A.D. 1985); *Sokolinski v. Woodbridge Township Municipal Council*, 469 A.2d 96 (N.J. Super. A.D. 1983)

The Wisconsin courts have held that if a local official votes on a contract in which the official's employer has an interest, the contract is void. *Heffernan v. City of Green Bay*, 266

which we are unaware, we advise that the Town Board Chair refrain from any official discussions or vote.

### *Second Town Board Member*

[9] The second town board member about whom you have asked also serves as a member of the local landfill negotiating committee. That individual's actions as a member of the local committee are exempt from the provisions of the Ethics Code for local officials. §19.59(1)(f), *Wisconsin Statutes*.

[10] With respect to the town board member's actions as a member of the town board, the same analysis as above applies. In this case, the Town Board member also cannot be said to be "associated" with the company that operates the landfill as that term is defined by statute. Moreover, we cannot say that the employment of the town board member's child by a company owned by the principal owner of the landfill operator, without more, violates the statutory prohibition of the board member's receipt of anything of value that could reasonably be expected to influence the member's judgment on the landfill expansion issue.<sup>7</sup> The board member does not appear to have any personal financial stake in the child's employment. And the board member's child's employment appears, at a distance, unlikely to be affected by the landfill decision.

[11] Thus, there appears to be no restriction under §19.59, *Wisconsin Statutes*, on the second town board member's participation in the local committee's negotiations or deliberations or in the Town's decision to expand the landfill.<sup>8</sup>

### Advice

[12] The Ethics Board advises that the Town Board Chair about whom you have asked should not, as a matter of public policy, participate in the town's

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Wis. 534 (1954) (if alderperson who voted to approve contract had been employee of individual's company when another company owned by the individual bid for the contract, the contract would have been illegal and void); *Edward E. Gillen Co. v. City of Milwaukee*, 183 N.W. 679 (Wis. 1921); *Ballenger v. Door County*, 131 Wis. 2d 422 (Ct. App. 1986).

*See also* 1994 Wis Eth Bd 03 (a state official is a beneficiary of a spouse's contribution to household income; that household's receipt of income from an organization with a substantial and demonstrated interest in issues likely to be addressed by the official's agency could reasonably be expected to affect the official's judgment and actions in a manner sympathetic to the spouse's employer); 1993 Wis Eth Bd 04.

<sup>7</sup> Our advice might differ if, for example, the town board member receives income from the child, as support or in payment of a debt, and the child's continued ability to pay is dependent on his employment, and that employment could be adversely affected if the landfill does not expand.

<sup>8</sup> Of course, a more restrictive local ordinance would control. In addition, local governmental units that have adopted Robert's Rules of Order may be subject to the conflict of interest provisions contained therein. *See Ballenger v. Door County, supra*.

consideration of the landfill expansion as long as the Chair derives financial benefit from his spouse's employment by a company owned by the individual owning the controlling interest in the landfill operator. The second Town Board Member may participate in that decision without restriction from laws administered by the Ethics Board.